



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2005

Ms. Luz E. Sandoval Walker
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901

OR2005-01949

Dear Ms. Walker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 219663.

The El Paso Police Department (the "department") received a request for a specified incident report. You claim that the requested information is excepted from disclosure pursuant to section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Initially, we note that the submitted information includes a protective custody affidavit. A "warrant of arrest" is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law. Crim. Proc. Code art. 15.01. Thus, based on this definition, a protective custody warrant can constitute an arrest warrant. Article 15.26 of the Code of Criminal Procedure provides that "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. You have provided no explanation as to why the submitted protective custody affidavit is not an arrest warrant affidavit subject to article 15.26 of the Code of Criminal Procedure. However, because we are unable to determine whether the submitted affidavit was presented to a magistrate in support of the issuance of an arrest warrant, we must rule in the alternative. Thus, to the extent that the affidavit that we have marked was, in fact, "presented to the magistrate in support of the issuance of an arrest warrant," it is

made public by article 15.26 of the Code of Criminal Procedure and must be released to the requestor. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989) (exceptions to disclosure found in the Act generally do not apply to information that is made public by other statutes). However, to the extent that the marked affidavit was not so presented, it is not made public by article 15.26 and must be disposed of in accordance with the remainder of this ruling.

You claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *See* Gov't Code § 552.101. This section encompasses the doctrine of common law privacy. Information is protected from disclosure by the common law right to privacy when it (1) is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are also protected from disclosure by the common law right to privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Based on your arguments and our review of the submitted information, we have marked the information that the department must withhold from disclosure under section 552.101 in conjunction with the common law right to privacy.

In summary, to the extent that the affidavit we have marked was presented to a magistrate in support of the issuance of an arrest warrant, it must be released pursuant to article 15.26. The department must withhold the information we have marked pursuant to section 552.101 in conjunction with common law privacy. The department must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

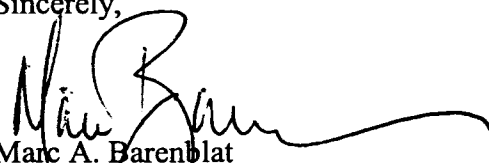
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/sdk

Ref: ID# 219663

Enc. Submitted documents

c: Ms. Lisa Marquez
10535 S.E. Fuller Road #38
Portland, Oregon 97266
(w/o enclosures)